State of Michigan
In the Supreme Court

Appeal from the Michigan Court of Appeals
Boonstra, P.J., and Hoekstra and Shapiro, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Supreme Court
Docket No. 150815

TIMOTHY WADE HORTON,

Defendant-Appellant.

_____/

Court of Appeals No. 324071
Oakland Circuit Court No. 2013-247924-FH

Brief on Appeal—Appellee

Oral Argument Requested

JESSICA R. COOPER
Prosecuting Attorney
Oakland County

THOMAS R. GRDEN
Chief, Appellate Division
Attorney for Plaintiff-Appellee
Oakland County Prosecutor's Office
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-0656

TABLE OF CONTENTS

INDEX TO AUTHORITIES CITED

CASES PAGE

STATUTES

MISCELLANEOUS AUTHORITIES

RULES

JURISDICTIONAL STATEMENT

Defendant-Appellant filed an application in this Court for leave to appeal the November 19, 2014, order of the Court of Appeals denying the Defendant's delayed application for leave to appeal for lack of merit in the grounds presented. In an order dated December 9, 2015, this Court granted the application and instructed the parties to address the following:

> The parties shall include among the issues to be briefed: (1) whether the defendant's unconditional no contest plea waived his claim of ineffective assistance of trial counsel based on trial counsel's failure to make a motion to dismiss for a 180-day rule violation, MCL 780.131 and 780.133, in light of *People v Lown*, 488 Mich 242, 267-270 (2011), or for constitutional speedy trial violations; (2) whether the defendant's unconditional no contest plea waived his claim of ineffective assistance of trial counsel for trial counsel's failure to inform the defendant that an unconditional no contest plea would waive his right to appeal on the basis of a 180-day rule violation or constitutional speedy trial violations; and (3) whether trial counsel's failure to inform the defendant that his unconditional no contest plea would waive his right to appeal on the basis of a 180-day rule violation and constitutional speedy trial violation made defendant's plea unknowing and involuntary.

This Court has jurisdiction over this appeal under MCR 7.301(A)(2) and MCR 7.302(H)(3)[1].

[1] The answer is counsel was not ineffective by not making a motion to dismiss based on the 180 day rule since that statute does not apply in this case. Counsel cannot be found to be ineffective for failing to do a useless act of telling defendant that the 180 day rule is waived when it is not applicable. Defendant's plea was not involuntary when there is no basis to make a claim of a 180 day rule violation. In this matter, both parties agree that the facts of this case do not support a 180 day rule violation, and as such, trial counsel cannot be found to be ineffective for failing to assert such a claim in the lower court, and defendant's plea is not affected by the nonapplication of MCL 780.131 and 780.133.

COUNTER- STATEMENT OF QUESTION PRESENTED

I. **Whether Defendant's unconditional plea, which was voluntary, knowing, and intelligently made, waived nonjurisdictional claims that occurred before the entry of the guilty plea?**

The People contend the answer is: "Yes."

The Defendant will contend that the answer is 'No."

The Court of Appeals found that the defendant's claim lacked merit.

CONSTITUTIONAL, STATUTORY AND COURT RULES INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, that:

"[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

Const 1963, art 1 § 20 Rights of accused in criminal prosecutions provides:

In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

768.1 Speedy trial; right of parties; duty of public officers.

The people of this state and persons charged with crime are entitled to and shall have a speedy trial and determination of all prosecutions and it is hereby made the duty of all public officers having duties to perform in any criminal case, to bring such case to a final determination without delay except as may be necessary to secure to the accused a fair and impartial trial.

Rule 6.004 Speedy Trial

(A) Right to Speedy Trial. The defendant and the people are entitled to a speedy trial and to a speedy resolution of all matters before the court. Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice.

Rule 6.310 Withdrawal or Vacation of Plea

(B) Withdrawal After Acceptance but Before Sentence. Except as provided in subsection (3), after acceptance but before sentence,
(1) a plea may be withdrawn on the defendant's motion or with the defendant's consent, only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by subrule (C).

INTRODUCTION

Defendant pleaded no contest to breaking and entering a building and to being a second habitual offender. In exchange for his plea, the supplemental information originally charging defendant with being a fourth habitual offender was dismissed.

Defendant, through appointed counsel, filed an application for leave to appeal with the Court of Appeals. (53a) The allegation in the application claimed that the plea was involuntary because defendant's attorney did not inform him that his plea constituted a waiver of any 'speedy trial' claims. *People v Lannom*, 441 Mich 490, 493-494; 490 NW2d 396 (1992) The Court of Appeals denied this application. (51a)

The timeline of events underlying defendant's present appeal was set forth in defendant's application. Defendant noted that he was arrested on August 31, 2012 and arraigned on September 19, 2012. Defendant claimed that a dismissal was entered on July 16, 2013, though court records show that it was actually dismissed on June 17, 2013[2]. The matter was rewritten and refiled on July 1, 2013, but dismissed a second time on September 23, 2013. Defendant claimed that the matter was rewritten and refiled on October 17, 2013[3], when it was actually rewritten with Defendant being arraigned on September 24, 2013. Defendant tendered a plea to the charge on March 7, 2014. (11a-32a) The relevance of the dismissal and rewrite dates is that the United States Supreme Court has held that the Speedy Trial Clause does not apply to the time between a case's dismissal and its rewrite, even if the defendant is aware that the charges might be reinstated and is therefore still subject to the "stress, discomfort, and * * * disruption." *United States v MacDonald,* 456 U.S. 1, 9 (1982).

[2] This date is a typo as the case was dismissed on June 17, 2013 (1a and 20b-21b).
[3] This date also appears to be in error as the preliminary examination was started on October 8, 2013 and concluded on October 16, 2013. (8a)

With regard to the present appeal, it should be noted that while this Court's order granting leave directed the parties to address defendant's claim of a potential 180 day rule violation, both defendant's appellate counsel and the People seem to agree that the facts of this case do not sustain defendant's pro per 180 day rule claim.

In lieu of proceeding on a 180 day rule claim, defendant's appellate counsel instead focuses upon a speedy trial claim. When asserting this speedy trial claim, defendant relies *solely* upon the 'presumption of prejudice' arising from trial delays that total over 18 months. Neither defendant's present counsel nor defendant himself have alleged any specific or actual prejudice arising from the delays in this case, beyond the presumed prejudice that applies to speedy trial claims that involve more than 18 months of total delay. However, as will be detailed in this brief, even defendant's own calculations place the total length of 'delay' at less than 18 months; removing the matter from the presumptive prejudicial balancing test of *Barker v Wingo*, 407 U.S. 514 (1972) and concurrently eliminating the ineffective assistance and waiver arguments that are dependent upon defendant's speedy trial claim.

Defendant's appellate brief appears to acknowledge that defendant's plea waived his right to challenge the speedy trial claim on appeal. In an attempt to circumvent the waiver-based appeal bar, defendant now argues that his attorney was 'ineffective' for not informing him that his unconditional plea waived his ability to challenge the speedy trial issue on appeal. Essentially, defendant is arguing that his plea was involuntary based on his lack of information or understanding that his case involved a potential speedy trial claim.

However, in defendant's pro per application for leave underlying the present appeal, defendant directly acknowledged discussing this speedy trial claim with his trial counsel, before

he agreed to tender his plea (in exchange for a reduction in his habitual offender status). Included within this application was Issue V, wherein defendant alleged the following.

> My attorney on the case M. Sanford she also allowed the prosecutor to violate my due process right by not challenging the reorder's or the speedy trial act violation which I brought to her attention more than once. She was very aware of it because an attorney filed one in May of 2013 but was denied by Judge Leo Bowman, stating that it had not been over 18 months. So when the court delayed by trial for on none reasons in February of 2014 I asked Ms. Sanford to file the motion for speedy trial violation she refused.

This acknowledgement is coupled with the defendant's testimony under oath during his plea, wherein defendant told Judge Bowman that he was satisfied with his attorney's advice and representation and that he had sufficient opportunity to have counsel answer any question that he might have. (18a-19a)

COUNTER-STATEMENT OF FACTS

Defendant Timothy Wade Horton is a 47 year-old male that has been in and out of the Michigan adult penal system since March of 1989. Defendant was most recently discharged by the Michigan Department of Corrections from parole on February 24, 2012.[4] Less than three months later, in May of 2012 he committed the instant offense. (9a)

The facts underlying Defendant's involvement in the present crime, as set forth through preliminary examination testimony, are as follows. It was determined that a 'Raven Engineering' building housing "unique" prototype aluminum parts had its telephone (alarm) lines cut and was then broken into on the evening of Sunday, May 20th, 2012 into the early morning hours of May 21st. (68b–73b and 81b–83b)

When Pro Green Recycling (a company that purchases scrap metal from individuals) opened the morning of Monday, May 21, 2012, Defendant arrived at this scrap metal business and sold the 300-600 pounds of unique aluminum parts that were stolen from Raven Engineering. (90b–93b) Despite being implicitly threatened by Defendant during the preliminary examination (94b-95b), the Pro Green employee testified regarding their collection of personal data from Defendant, and also identified Defendant as the person who sold them the unique aluminum prototype parts that were later revealed to have been stolen from Raven Engineering. (91b and 95b-98b) A photograph of Defendant was taken during this transaction. (97b-98b)

[4] See the Michigan Department of Correction's web site, OTIS for Defendant's complete record. Although Defendant's presentence report detailing his record was also attached to his motion to remand filed with his application for leave to appeal in the Court of Appeals.

Defendant's thumb print was also taken during his sale of this property to Pro Green. (95b) Defendant's identification, including his name, was also collected by Pro Green, during this transaction. (92b-93b)

Defendant's cell phone was identified as having been used to make multiple calls using the two cell towers nearest to the building from which the parts were stolen, during both the approximate time that the telephone alarm lines at Raven Engineering were cut before the break in, as well as a few hours later, when the building was breached and the unique prototype aluminum parts were stolen. (108b-111b) It was noted at the preliminary examination that Defendant's phone was also identified as having used the cell towers nearest to the Pro Green Company, during the time that Defendant sold them the unique stolen goods; with his use of this cell phone apparently captured in the photograph taken of him during this transaction. (112b)

The Oakland County Prosecutor's Office authorized a complaint charging the Defendant with breaking and entering a building contrary to MCL 750.110 in July of 2012. The warrant was sworn to by the Detective in-charge on July 19, 2012 in the 52-3 District Court. Defendant could not initially be located because he was in Elkhart, Indiana on a surety bond for a burglary committed in April of 2012[5].

In August of 2012 Defendant pleaded guilty to the burglary charge in Indiana. He waived his right to be sentenced within 30 days and then waived an extradition hearing sought by Michigan authorities. He was taken into custody and transported back to Michigan on August 31, 2012.

On September 1, 2012 defendant was arraigned and a $25,000.00 cash or surety bond

[5] Defendant was on bond to the Indiana Court when he committed the instant offense. In November of 2012, the Indiana court ordered the bondsman to produce the defendant, and reset defendant's sentencing for November 19, 2012. When defendant did not appear, the Indiana Court issued a bench warrant and set bail at $20,000.00.

was set. The preliminary examination was held on September 18, 2012 and Defendant was bound over for trial to the Oakland County Circuit Court. The general information and supplemental information charging defendant with being a fourth habitual offender were filed, and on October 2, 2012, Defendant was arraigned. After a pretrial in late October the matter was set for trial on April 15, 2013. (1a) In March, Defendant's court appointed counsel filed a motion to withdraw as counsel. Judge Bowman granted the motion on April 2, 2013 and a second attorney was appointed to represent the Defendant. Another pretrial was held on April 23. On May 15 one month after the trial was scheduled, Defendant's second attorney filed a motion to dismiss for lack of a speedy trial. (1a). On May 28, 2013 the motion to dismiss was denied. A second and final pretrial was set for June 6, 2013, at which time the case was set for a bench trial on June 17, 2013. (1a)

On the date set for trial, the People sought an adjournment because at least one witness with records was unavailable. Judge Bowman declined to adjourn the trial and at the defense request dismissed the case. (1a)

The complaint was rewritten, and on July 1, 2013, Defendant was arraigned in the District Court with his third attorney. A preliminary examination was held on that date, and the case was again bound over to Circuit Court. At the Circuit Court arraignment, trial counsel indicated that he was aware of the previous dismissal and would investigate a possible resolution in this matter. (25b) Trial was set for September 23, 2013. On the first trial date, the People were not prepared because further investigation had disclosed that several other crimes committed by Defendant were committed in a similar style as the instant offense, and the People wanted to present MRE 404(b) evidence. The People's request for an adjournment was denied. (37b) Defendant through his counsel again asked for a dismissal while acknowledging that a rewrite of

the complaint would restart the speedy trial clock. (33b). The record also reflected that Defendant would not be released because of the hold from the Indiana case. (33b). Judge Bowman acknowledged that the request for an adjournment was based upon different reasons than the People's request for an adjournment in the previous case, but the trial judge still granted the defense request for a dismissal. (3a and 37b-38b)

The charge was re-written, and Defendant was arraigned on September 24, 2013. On October 16, 2013, the third preliminary examination was held in the 52-3 District Court and resulted in the Defendant again being bound over for trial. The Circuit Court arraignment was on October 29, 2013 and a pretrial was held on November 12, 2013 with Defendant's fourth court appointed counsel. (7a) A second pretrial resulted in the matter being set for trial on February 20, 2014. The trial date was adjourned by the Judge until March 6, 2014. (7a) On March 7, 2014, defendant tendered a no contest plea to the charge of breaking and entering a building and being a second habitual offender. In exchange for tendering his plea, the People agreed to reduce the habitual fourth to a habitual second offense, thereby reducing Defendant's potential sentence from a life maximum as a Habitual fourth offender, to a maximum of 15 years as a Habitual second offender. Judge Bowman also told the Defendant that he could give him credit for the time he had served to the date of sentencing. (22a).

Defendant was placed under oath by Judge Bowman. (16a) Trial counsel informed the court that she had received all discovery, and had advised the Defendant of his ability to go to trial and the possible outcomes. They had a long discussion on credit and the prior dismissals and detainer from Indiana. (16a) Judge Bowman asked the Defendant if he had the time to discuss this matter with his attorney and ask any questions that he had. Defendant indicated that he had received answers to his questions even if they were not the answers that he wanted to hear. (18a)

Defendant then indicated that he did not need any further time to consult with his attorney and that he had a competent understanding of what was occurring. (18a) Defendant told Judge Bowman that he was satisfied with his attorney's advice and her representation. (19a) There had been no threats made. He was entering the plea freely and voluntarily and knew that a jury was available as he had discussed with his attorney. (21a) Defendant acknowledged that another State was seeking to extradite him. (20a) He denied that there were other representations or promises made, and that he had signed the plea agreement. (23a-24a) Defendant admitted that he had at least two prior felonies and that as a habitual fourth offender he faced a possible life sentence while as a second habitual offender his maximum sentence was capped at 15 years. (24a-26a)

Judge Bowman detailed for Defendant the rights that he was waiving by entering his plea. He also informed Defendant that any appeal would be by application and not as of right. Defendant acknowledged going over the plea form with his attorney and signing it. He had no questions about any provision on the form. He plainly stated that he needed no further time to discuss this with his attorney. (29a)

Defendant, while under oath, told the trial court that he was giving up any claim that the plea was not his own choice, that the plea was not the result of an undisclosed promise, agreement or threat. (30a) The parties stipulated to the police report and preliminary examination transcript to establish the factual basis for the no contest plea. As noted, at exam, cell tower records placed the Defendant near the site of the breaking and entering. He was captured in a photograph selling the stolen items at a scrap yard on the day of the breaking and entering, where he gave his fingerprint, driver's license and phone number at the time of the sale.

On April 8, 2014 trial counsel indicated that she had reviewed the presentence report and had no additions or corrections. She also indicated that Defendant wanted to withdraw his plea

because he was now claiming that the plea was not freely, knowingly and voluntarily made (35a-36a)[6] Judge Bowman indicated that he recalled Defendant's plea and was satisfied that the plea was knowingly, freely and voluntarily entered. "There exists no basis for the court to allow him to withdraw his plea." (37a) Trial counsel acknowledged that Defendant has an extensive record but asked for a sentence at the bottom of the guidelines.

When Defendant was asked if he wanted to address the Court, he indicated his regret and apologized for wasting time. He never claimed that his plea was not freely, understandingly and voluntarily made. (39a) Defendant's own words were "my only gripe with the plea was I had an understanding, I thought we all had an understanding that – well, never mind." Judge Bowman noted that Defendant had 15 prior felony convictions and one subsequent felony, before he adopted the recommendation of the presentence report and sentenced Defendant within the guidelines to a term of 47 months to 15 years with credit for 585 days served. (42a)

[6] An additional objection was made to the amount of restitution being requested. A hearing was scheduled to resolve that issue which is not before the Court.

ARGUMENT

I. Defendant's unconditional plea, which was voluntary, knowing, and intelligently made, waived nonjurisdictional claims that occurred before the entry of the plea.

Defendant challenges his unconditional plea.[7] Because an unconditional plea constitutes a waiver of any speedy trial claims, defendant is alleging that trial counsel was ineffective by not challenging the personal jurisdiction of the Court based on a lack of a speedy trial.

Three distinct components are thus raised by the Defendant's allegation of error, the plea proceeding, the speedy trial claim, and the ineffective assistance of counsel.

A. The Plea:

Issue Preservation

Defendant challenges the unconditional plea made under oath in the trial court. At sentencing, counsel for Defendant indicated that "During my discussion with my client regarding the PSI, my client indicated to me that he was remanding(sic) to withdraw his plea. This is a case for which the Court is well aware we did a lot on the date of trial to resolve this matter; however, upon discussions with my client he's indicating that the plea was not freely, knowingly, and voluntarily made and he wants to withdraw his plea." (35a-36a) Defendant, when addressing the Court, stated "my only gripe with the plea was I had an understanding, I thought we all had an understanding that -- well, never mind." (39a)

A fair reading of counsel's comments and Defendant's own words reveals that Defendant was dissatisfied with the potential sentence, or in his words, changed his mind about withdrawing his plea when he told the trial court "never mind."

[7] Pleas of no-contest are treated the same as guilty pleas for purposes of the case in which the no-contest plea is entered. See *Lott v United States,* 367 U.S. 421, 426*;* (1961); *People v New,* 427 Mich 482, 493 n 10; 398 NW2d 358 (1986).

Standard of Review

A trial court's decision regarding a motion to withdraw a plea is reviewed for an abuse of discretion. *People v Cole*, 491 Mich 325, 329-330; 817 NW2d 497 (2012). There is no absolute right to withdraw a plea. *People Williams*, 288 Mich App 67, 71; 792 NW2d 384 (2010), aff'd 491 Mich 164 (2012). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error." *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010).

"The proper interpretation and application of a court rule is a question of law that is reviewed de novo." Cole, 491 Mich 330. The rules of statutory construction also apply to court rules. *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009). "If the language of the court rule is clear and unambiguous, judicial construction is normally neither necessary nor permitted." *People v Strong*, 213 Mich App 107, 111; 539 NW2d 736 (1995). Thus, the unambiguous language of court rules must be enforced as written. *Williams*, 483 Mich at 232.

Analysis

MCR 6.310(B)(1) governs the procedure for plea withdrawal before sentencing. It provides:

> Withdrawal After Acceptance but Before Sentence. Except as provided in subsection (3), after acceptance but before sentence,
>
> (1) a plea may be withdrawn on the defendant's motion or with the defendant's consent, only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by subrule (C).

In the present matter, Defendant never established that the withdrawal of his plea was in the interest of justice. Instead, a fair reading of the transcript suggests that the oral motion to withdraw was based on Defendant's dissatisfaction with his possible sentence and the presentence recommendation. Defendant's own words to the trial court indicate that he was under a misunderstanding of the possible sentence, before he told the trial court to "never mind." The assistant prosecutor argued that it would be prejudicial to the People because they were prepared to go to trial *with out-of-state witnesses* when the plea was tendered. (36a) The People also pointed out that there was a plea bargain that reduced the defendant's potential prison time, and that the trial court was awarding Defendant credit for all of the time that he was in custody. (36a) Judge Bowman denied the motion, finding that the plea was entered into freely, knowingly and voluntarily, and that there existed no basis for the withdrawal of the plea. (37a)

If this Court were to determine that the oral motion made by trial counsel preserved the plea withdrawal request, and that the Defendant did not, by his statements withdraw that motion, there is no evidence that it was in the interest of justice to allow the Defendant to withdraw his plea. The People demonstrated that they entered into a plea bargain to resolve this matter and would be prejudiced if the Defendant were allowed to withdraw the plea.

A defendant's guilty plea is a reliable determination of factual guilt; and as such, the guilty plea waives any issue of the state's capacity to prove that factual guilt. *People v New*, 427 Mich 482; 240 NW2d 358 (1986). Michigan courts and this Court in particular have looked to the Supreme Court and the decisions setting out the basic rules governing attempts by defendants to overturn their own prior guilty pleas. The Supreme Court, in a trilogy of cases decided in 1970 and a fourth case decided in 1973 *Brady v United States,* 397 U.S. 742 (1970); *McMann v Richardson*, 397 U.S. 759 (1970); *Parker v North Carolina*, 387 U.S. 790 (1970) and *Tollett v*

Henderson, 411 U.S. 258 (1973), limited a defendant who tendered an unconditional plea the ability to attack the plea based on potential defenses not raised. In each case, the defendant had a defense that might have been successful if he had litigated it rather than pleading guilty, but the Court refused to allow the guilty plea to be set aside on the basis of later factual or legal developments indicating that the defense might have succeeded.[8] The *Brady* Court wrote:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation * * *, or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes).
>
> *Brady*, 397 U.S. at 755.

Elaborating on this stringent standard, the Court added in *Brady* that "[a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action" *Brady*, 397 U.S. at 757. "[T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments" *McMann*, 397 U.S. at 769, in part because "uncertainty is inherent in predicting court decisions" *Id.* at 771. Thus, "[w]aiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts." *Id*. at 770. "Although [the defendant] might have pleaded

[8] *Brady* involved a plea of guilty allegedly induced by the defendant's fear that he would receive the death penalty -- under a statute whose death penalty provision was later held unconstitutional in *United States v Jackson*, 390 U. S. 570 (1968). -- if he went to trial. *McMann* involved pleas of guilty allegedly induced by the defendants' expectation that coerced confessions would -- under a procedure later held unconstitutional in *Jackson v Denno*, 378 U.S. 368 (1964) -- be made known to the same jury that would decide the defendants' guilt or innocence. *Parker* involved a plea of guilty allegedly induced both by fear of the death penalty (under a statute alleged to be unconstitutional) and by fear of the use of an allegedly coerced confession. *Tollett* involved a claim, well grounded in fact but not recognized by the defendant or his attorney at the time of the guilty plea in 1948, that black persons were systematically excluded from grand juries in Davidson County, Tennessee.

differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." *Id. a*t 774. Refusing (in light of the defendant's guilty plea) to entertain an apparently meritorious challenge to the composition of the grand jury, the Court added in *Tollett:*

> A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry. And just as it is not sufficient for the criminal defendant seeking to set aside a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical facts, * * * it is likewise not sufficient to show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings.
>
> *Tollett,* 411 U.S. 267.

Further, no decision of the United States Supreme Court has held that conscious waiver is necessary with respect to each and every potential defense relinquished by a plea of guilty. *United States v Broce et al.,* 488 U.S. 563, 573 (1989).

Defendant's informed decision to tender an unconditional plea, made after consultation with his attorney, and after a valid waiver of his constitutional rights to the trial court while under oath, remains unrebutted. The People have detrimentally relied on Defendant's plea, and allowing defendant to repudiate those promises (his choice made freely, knowingly and voluntarily after consultation with counsel) would prejudice the government. Judge Bowman's decision to deny the motion to withdraw the plea that he determined was made freely, knowingly and voluntarily was not an abuse of discretion.

B. Speedy Trial:

Issue Preservation:

Defendant's conviction was the result of an unconditional plea entered pursuant to an agreement where the People dismissed the habitual fourth charge in return for a plea to breaking and entering and habitual second offender. Defendant's alleged claim that his right to a speedy trial has been violated was waived by his unconditional plea. *People v Lannom*, 441 Mich 490, 493-494; 490 NW2d 396 (1992) citing *People v Smith*, 438 Mich 715, 475 NW2d 333 (1991). As this Court noted in *Lannom*, the *Smith* Court also would have held that a plea waives the 180 day rule. *Lannom*, 441 Mich 494 fn7. While *Smith* was overruled by *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006), but only to the extent that the decision was inconsistent with the plain language of the 180 day statute. *Williams*, 475 Mich at 248.

Standard of Review

All non subject-matter jurisdictional defects are waived by Defendant's unconditional plea. *People v Lown*, 488 Mich 242, 268; 794 NW2d 9 (2011). *See* Justice Boyle's concurring opinion in *Smith*, 438 Mich at 719 dealing with the differences subject matter and personal jurisdiction which was adopted by the majority in *Lown* 488 Mich at 269-270. One of the four attorneys that represented the defendant filed a motion to dismiss based on lack of a speedy trial. However, this same attorney sought and received a dismissal of the case when the People asked for an adjournment because a witness was not available. In the two subsequent rewrites, no motion to dismiss for lack of a speedy trial was bought by defendant or his appointed counsel. Thus, even if the speedy trial issue was not waived by defendant's unconditional plea, defendant would have to establish plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Of course defendant could not demonstrate that the error

resulted in the conviction of an actual innocent person because his punishment is dependent upon his unconditional plea.

To the extent that this issue is properly before this Court, whether a defendant was denied a speedy trial is a mixed question of law and fact. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). A trial court's factual findings are reviewed for clear error and constitutional claims are reviewed de novo. *Williams,* 475 Mich at 250.

Analysis

The United States and Michigan Constitutions' guarantee defendant the right to a speedy trial. *US Const*, Am VI; *Const* 1963, art 1 § 20. Also see MCL 768.1 and MCR 6.004(A). The protection afforded by the constitutions begins with the start of the criminal prosecution, when a defendant is arrested. *United States v Marion*, 404 U.S. 307, 313 (1971); *Williams,* 475 Mich at 261.

In *Barker v Wingo*, 407 U.S. 514, 523 (1972)[9] the majority declined to affix a certain number of days to try a defendant. "We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." Rather the Court developed a four part balancing test that has been adopted by the Michigan Courts. *People v Grimmett*, 388 Mich 590; 202 NW2d 278 (1972) and *People v Collins*, 388 Mich 680; 202 NW2d 769 (1972).[10]

[9] *Barker* was indicted in September of 1958, but did not go to trial until October of 1963, because the People wanted to try the codefendant and then use his testimony against Barker. The unavailability of a witness excused much of the delay.

[10] *Collins* uses the 18 month line that allegedly was established by *People v Den Uyl*, 320 Mich 477; 31 NW2d 699 (1948). However, *Den Uyl* involved a delay of 20 months from "Appellants' arrest to the last adjourned date of the examination, and from the commencement of the examination over 18 months." This delay did not result in a dismissal but a remand for the magistrate to bind the matter over for trial or dismiss within 60 days.

In evaluating a speedy trial claim, the court balances four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Williams*, 475 Mich at 261-262.

1. Length of the Delay

Even if Defendant had not waived or abandoned his speedy trial claim, it would fail on the merits. First, the length of the delay does not weigh against the prosecution. There is little dispute that defendant was arrested on the outstanding warrant on August 31, 2012 and brought back to Michigan where he was arraigned on September 1, 2012. The matter proceeded at a normal pace toward a trial date of April 15, 2013. On April 2, 2013, defense counsel filed a motion to withdraw. Judge Bowman granted the motion and appointed new counsel. This second attorney filed a motion to dismiss for lack of a speedy trial in May of 2013, when the case was eight months old. The motion to dismiss for lack of a speedy trial was denied at the end of May 2013. The matter was set for a bench trial on June 17, 2013, but because of a missing witness (as previously noted, the case required an out of state witness) the People were unable to proceed to trial. The People requested an adjournment, but the defense sought and received a dismissal without prejudice. (37b-38b)

The matter was rewritten and Defendant was arraigned on July 1, 2013 and preliminary examination was conducted (67a). Defendant was represented by a third attorney. The matter was set for trial on September 23, 2013. However, the People were not prepared because when the matter was rewritten, the complete file was not transferred to the new file. Therefore, notice of the People’s intent to use 404(b) evidence was not filed nor the appropriate witness subpoenaed. Despite the case being less than three months old from the rewrite and just more than one year from the initial arrest of the defendant, the defense again sought a dismissal. The

defense acknowledged that the defendant would not be released[11] and that the speedy trial clock would restart. (33b) Judge Bowman again dismissed the matter without prejudice because he determined that the reason that the People were not prepared was totally different than the previous dismissal.

The matter was rewritten a second time. The third preliminary examination was held in October, a pretrial in November and a trial date was set for early February. The trial was adjourned by the court until the first week in March when the defendant pleaded no contest.

The total time from arrest to plea was 18 months and one week. However, as *McDonald* established, the time when no charges are pending is not counted in the speedy trial determination. Specifically, absent bad faith by the prosecutor, a delay is not "attributed to either side" when there is no charge pending against defendant. *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993) This is true even when the prosecution caused the dismissal by failing to prepare for trial. *Id*. Thus, when the periods between the June 17, 2013, dismissal and the July 1, 2013 rewrite/arraignment are excluded from the time between arrest and Defendant's plea, the delay is reduced to approximately 17 months and three weeks.

2. Reasons for the Delay

When evaluating speedy trial claims, this Court attributes each period of delay to either defendant or the prosecution. Delays due to scheduling, docket congestion, and other delays inherent in the court system are attributed to the prosecution, but are assigned only minimal weight. *People v Gilmore,* 222 Mich App 442, 460; 564 NW2d 158 (1997). In the present case, the delay between counsel's request to withdraw in late March of 2013 and the appointment of substitute counsel is attributed to the defendant. The time to hear and decide defendant's motion

[11] Defendant had a hold on him from the State of Indiana because of a bench warrant when he failed to show up for

for dismissal for lack of a speedy trial is also attributed to the defendant. (1a) Most of the other delay is attributable to the normal time of a case moving through the court system, i.e. arrest, arraignment, preliminary examination, bindover, circuit court arraignment, pretrial and then being set for trial. While these times are counted against the People they are given only minimal weight. Therefore, because both sides contributed to the delays, this factor does not weigh in either party's favor.

3. Defendant's Assertion of the Right

A defendant is not required to assert his right to a speedy trial, but "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. *Collins*, 388 Mich at 692 quoting *Barker*, 407 U.S. at 532. Early on in the case, Defendant, through his second court appointed counsel, filed a motion to dismiss for lack of a speedy trial. This motion was denied in May of 2013. No further motion or demand was ever made by the defense. This is relevant because a motion for dismissal is effective *only* for periods of time which predate the filing of the motion. *United States v Connor*, 926 F 2d 81, 84 (CA 1, 1991). A court should only consider the delay that occurs prior to the motion. The right to contest any subsequent delay is waived unless the defendant brings a new motion to dismiss. *United States v Wirsing*, 867 F2d 1227, 1230 (CA 9, 1989).

In *People v Harris*, 110 Mich App 636, 647; 313 NW2d 354 (1981), the court noted that the defendant's failure to assert her right to a speedy trial until more than eighteen months after she was arrested weighed against her. The Court recognized that the late demand for a speedy trial showed that the defendant was unconcerned with the delay or chose to remain silent to build error into the record. *Id*, at 647. See also *People v Simpson*, 207 Mich App 560, 564; 526 NW2d

---

sentencing. (13b)

33 (1994) (4 ½ year delay did not result in denial of speedy trial based in part that the defendant waited 3 ½ years to assert his right); *People v Ewing*, 101 Mich App 51; 301 NW2d 8 (1980) (where failure to assert right to speedy trial does not automatically constitute a waiver, it is strong evidence to support the conclusion that a defendant's right has not been violated); *People v Cutler*, 86 Mich App 118, 126-127; 272 NW2d 206 (1978); *People v Classen*, 50 Mich App 122, 126; 212 NW2d 783 (1973). See also *Coney v State*, 259 Ga App 525; 578 SE2d 193 (2003) (no speedy trial problem where the defendant failed to demand a speedy trial for 41 months). Defendant's lack of a demand for a speedy trial in this case must be held against him. See *Coney*, 259 Ga App at 527(it is the defendant's responsibility to assert the right to trial, and the failure to exercise that right is entitled to strong evidentiary weight against the defendant); *State v Zmayefski*, 836 A2d 191 (RI, 2003) (if the defendant was concerned that his defense was in jeopardy because of the delay in prosecuting the case, he should have insisted on his right at some point during the seven years).

4. Whether Defendant was Actually Prejudiced

The fourth prong of the *Barker* test looks at whether the defendant was actually prejudiced by the delay. There are two types of prejudice that a defendant may experience, prejudice to his person and prejudice to his defense. *People v Chism*, 390 Mich 104, 114; 211 NW2d 193 (1973). Prejudice to his person would take the form of oppressive pretrial incarceration leading to anxiety and concern. *Id*. Prejudice to a defense might include key witnesses being unavailable. *Id*. Impairment to the defense is the more serious of the two different types of prejudice. *Id*.

While defendant was in jail awaiting trial, he would have been in jail or prison during this time even if these charges were never written, based on his plea of guilty in Indiana where he

agreed to a four year sentence (3b). As such, Defendant can not demonstrate any prejudice to his person as a result of these delays.

Moreover, just like in *Chism*, in the present case there was no evidence in this case that Defendant's defense in any manner was actually prejudiced by the delay. Defendant relies on the 18 month presumption, because without the presumption there is simply no evidence of actual prejudice. There are no witnesses for the defense that became unavailable or evidence that was lost. There is no evidence of prejudice.

The case against defendant was based on his phone placing him in the vicinity of the breaking and entering, his selling the stolen parts and providing identification at the point of the sale and his picture at the scrap yard cashing the ticket. Weighing the four speedy trial factors establishes that the Defendant's ability to defend against this charge was in no way prejudiced by the delays in this case: as the evidence against him was for the most part unaffected by time (i.e. his cell phone records linking him to the building(s), his picture while selling the unique stolen goods, his thumb print, etc). Instead, Defendant tendered his plea (in exchange for a reduction in his Habitual Offender status) because there was no likelihood that the trial court would have found in his favor and dismissed the charges. Defendant, with counsel, could plainly see that he was better off taking the plea and limiting his potential sentence to 15 years instead of a possible life sentence.

C. Ineffective Assistance of Counsel

Defendant's final claim, which constitutes the bulk of his appellate argument, is an ineffective assistance of counsel argument that attempts to boot strap Defendant's waived speedy trial claim. When a defendant alleges that he received ineffective assistance of counsel in the context of a plea, the inquiry is whether the defendant tendered the plea voluntarily and

understandingly. A court should look to the basic fairness of the proceeding, not the outcome, to determine if the defendant received the effective assistance of counsel. This renders moot the question of whether a difference in tactics would have led to a different result, or whether another lawyer can find something in the record that trial counsel did not do or employ. As Justice O'Conner stated in *Engle v Issac*, 456 U.S. 107, 133-134 (1992):

> Every trial presents a myriad of possibilities. Counsel might have overlooked or chosen to omit respondent's due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not ensure that defense counsel will recognize and raise every conceivable constitutional claim.
>
> *Engle* 456 U.S. at 133-134.

Issue Preservation

Defendant's conviction was the result of an unconditional plea entered under a plea bargain where the habitual fourth sentencing enhancement was reduced to a habitual second offender, and the trial Court agreed to give the credit for time served from the time of the arrest to the time of his sentencing. Defendant's current claim is that his trial counsel was ineffective by not informing the defendant that his unconditional plea waived any challenge to his claim of a lack of a speedy trial. Defendant seeks to "circumvent his accurate, voluntary, and understanding unconditional guilty plea, which necessarily involves a waiver of such an error by claiming that defense counsel was ineffective," by failing to preserve the speedy trial issue through a conditional plea. *People v Vonins (Aft Rem)*, 203 Mich App 173, 175; 511 NW2d 706 (1993), lv den 447 Mich 971 (1994).[12] "Where the alleged deficient actions of defense counsel relate to

[12] *Vonins* has been cited more than three dozen times by panels of the Court of Appeals. Also see *People v Nunn*, 173 Mich App 56; 433 NW2d 331 (1988), and *People v Scott*, 275 Mich App 521; 739 NW2d 762 (2007) lv den 480 Mich 920 (2007). Despite defendant's reliance on *Hill v Lockhart*, 474 U.S. 52 (1985) the People do not dispute that claims of ineffective assistance of counsel under *Strickland* can be reviewed, it is only the scope that is in

issues that are waived by a valid unconditional plea, the claim of ineffective assistance of counsel relating to those actions is also waived." *Vonins (Aft Rem)*, 203 Mich App at 176.

Standard of Review

Assuming arguendo that the claim of ineffective assistance of counsel is preserved for review, constitutional questions are reviewed de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 amended 481 Mich 1201 (2008).

Analysis

Defendant first argues that defense counsel was ineffective by not informing him that his unconditional plea bargain would waive his claim of a lack of a speedy trial. Because defendant did not raise this ineffective assistance of counsel claim in the trial court or hold an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), review of this issue is limited to mistakes apparent on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Effective assistance of counsel is presumed and defendant has a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of

---

question. As *Hill*, makes clear, "Attorney errors come in an infinite variety and are as likely to be utterly harmless as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct is to be avoided. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Hill*, U. S. at 58.

> the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann.*
>
> *Tollett,* 411 U.S. at 267.

In the case of *In re Oakland County Prosecutor*, 191 Mich App 113; 477 NW2d 455 (1991) the panel was deciding a claim of ineffective assistance of counsel following a guilty plea based on trial counsel's best guess as to the minimum sentence. The panel looked to United States Supreme Court cases for the appropriate review of ineffective assistance of counsel claims arising out of guilty pleas. The panel offered the following quote from *McMann:*

> [A] decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. *Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.*
>
> That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing. . .
>
> In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence *depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.* On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. 397 U.S. 770-771.[Emphasis added in the original.]

The panel then announced that in guilty plea cases, the *Strickland* test for ineffective assistance of counsel must be applied in light of the guidance set forth in *McMann*, 397 U.S. 770-771 and *Tollett*, 411 U.S. 267. *In re Oakland County Prosecutor,* 191 Mich App at 122.

The People agree that the decision to tender an unconditional plea belongs to the defendant, after consultation with counsel. *People v Corteway*, 212 Mich App 442, 446; 538

NW2d 60 (1995). This does not mean that counsel must tell defendant what to do, only that they reasonably inform a defendant of their options. Defendant does not argue that any alleged failures of his attorney actually kept him from understanding the plea to which he agreed. Defendant acknowledged on the record, under oath at the plea preceding, that he fully understood the plea and sentencing agreement. Defendant affirmed that he was satisfied with his counsel's advice. A party or witness may not create a factual dispute by submitting an affidavit that contradicts his own sworn testimony. Defendant's after the fact affidavit offers little value. CF *Dykes v Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001); *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997). Defendant's unequivocal affirmations in open court that he understood the plea and the agreement, demonstrates that he was afforded effective assistance.

In any event, the facts of this case establish that trial counsel and defendant discussed the speedy trial claim. Defendant specifically states in his pro per application (Issue V-reproduced in the statement of facts) that he discussed the speedy trial issue with trial counsel on two occasions and that he wanted a motion filed in February, one month before his unconditional plea.

The standard for judging trial counsel's performance was established by the Supreme Court in *Strickland* v. *Washington*, 466 U.S. 668 (1984). In *Strickland*, this Court established a two-part test in which the petitioner must prove deficient performance and prejudice therefrom. See *Strickland*, 466 U.S. at 697. To prevail on the deficiency prong, a defendant must demonstrate that his counsel's conduct failed to meet the constitutional minimum guaranteed by the Sixth Amendment. "[H]e [petitioner] must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Any analysis of trial counsel's performance must also take into account the reasonableness of counsel's actions in light

of all of the circumstances. See *Strickland,* 466 U.S. at 689. "[I]t is necessary to judge ... counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Lockhart* v. *Fretwell,* 506 U.S. 364, 371 (1993) (quoting *Strickland,* 466 U.S. at 690). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement." *Burt v Titlow*, 571 U.S. ____ (2013). This Court, in the absence of any evidence in the record to the contrary (and consistent with Defendant's own acknowledgement that he discussed the speedy trial claim with his trial counsel on two occasions), must presume that trial counsel provided adequate advice to defendant on accepting the plea bargain and the scope of the speedy trial argument. When the strength of the People's case is coupled with the benefits to the Defendant of accepting a plea bargain that reduced his Habitual status from a Fourth Offender to a Second Offender, it should be clear that facing a 15 year maximum is a substantially better position than facing a life maximum sentence.

In fact, in order to prove prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Strickland,* 466 U.S. at 694. Furthermore, "[t]o meet the prejudice prong, the [petitioner] must affirmatively prove, and not merely allege, prejudice." *DeVille* v. *Whitley,* 21 F.3d 654, 659 (CA 5, 1994); *Theriot* v. *Whitley,* 18 F.3d 311, 314-15 (CA 5, 1994). In this context, a reasonable probability of prejudice is "a probability sufficient to undermine confidence in the outcome." *ld.* In making a determination as to whether prejudice occurred, courts review the record to determine the relative role that the alleged trial errors played in the total context of the trial "

[I]t is not enough, under *Strickland*, "that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Reviewing courts may not indulge in "the natural tendency to speculate as to whether a different trial strategy might have been more successful." *Lockhart*, 506 U.S. at 372 (1993); quoted in *Maryland v Kulbicki*, 577 U.S. ___(2015) (the United States Supreme Court summarily reversed the Maryland courts that found the defendant's trial counsel to be ineffective for not finding a report which would have undermined the prosecution's expert witness.)

Even if Defendant can carry his burden and prove to the exclusion of reasonable hypothesis that his counsel's advice was deficient under prevailing professional norms, he has offered no evidence to satisfy the prejudice prong. Defendant must show that there is a reasonable probability that he would not have pleaded and would have insisted on going to trial despite facing a possible life sentence.

Padilla v Kentucky offers no safe port for this defendant. In *Padilla*, the majority found that the trial attorney's advice regarding deportation was deficient. The majority did not find the necessary prejudice and remanded the matter to the trial court because the defendant had not sufficiently alleged or established prejudice to satisfy *Strickland's* second prong. The majority noted that even in circumstances where a defendant like Padilla was given clearly erroneous legal advice, it is quite difficult for petitioners who have tendered a plea to satisfy the prejudice prong. *Padilla v Kentucky*, 559 U.S. 356, 371 (2010).

Padilla does not support defendant's claim that counsel is required to provide advice on matters that are of collateral consequence. Rather the majority stated "We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable assistance" required under *Strickland*, 466 U.S., at 689, 104 S Ct.

2052, 80 L Ed 2d 674. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation." *Padilla*, 559 U.S. at 365. This is in accord with the decision of this Court in *People v Cole*, 491 Mich 325, 334-335 (2012) where the unanimous Court declined to explore this "oft-nuanced distinction" between direct and collateral consequences because electronic monitoring was part of the sentence.[13]

In 2011, the United States Supreme Court decided three additional cases all dealing with claims of ineffective assistance of counsel. In *Cullen v Pinholster*, 563 U.S. 170 (2011) the defendant was convicted of first degree murder and sentenced to death. He alleged that his counsel was ineffective because he had failed to investigate potential mitigating factors to present at the sentencing hearing. The majority noted that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement." "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." "A reasonable probability is a probability sufficient to undermine confidence in the outcome." This requires a "substantial," not just "conceivable," likelihood of a different result. (citations omitted) In ruling that the Ninth circuit had misapplied *Strickland*, the majority noted that counsel has "wide latitude" in making tactical decisions, and that no other guideline other than reasonableness is appropriate. *Pinholster*, 563 U.S. at 579.

[13] Justice Cavanagh invited the readers of *Cole* to see a law review article cited within the opinion. That article concludes that the three tests used are generally sparsely reasoned. The conclusion essentially draws a line between sentencing consequences and all other consequences that fall outside the range of a defendant's punishment. Cf. the language in *People v Ybarra,* 493 Mich 862;820 NW2d 908 (2012) where Justice Zahra used the term sentencing consequences, in his concurring statement to the order denying leave.

The Court of Appeals was required not simply to "give [the] attorneys the benefit of the doubt," but to affirmatively entertain the range of possible "reasons Pinholster's counsel may have had for proceeding as they did."

In *Premo v Moore*, the defendant pleaded no contest to felony murder in exchange for a sentence of 300 months. He later claimed that his plea was involuntary based on ineffective assistance of counsel for failing to seek suppression of the defendant's confession. The majority relying on *Strickland* in reviewing the matter noted:

> Even under the *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew materials outside the record, and interacted with the client, with opposing counsel, and with the judge. The question being whether the attorney was incompetent in their representation under existing professional norms not whether it deviated from best practices or most common custom.
>
> *Premo v Moore,* 562 U.S. 115, 122 (2011).

The majority noted that trial counsel must make strategic choices and balance opportunities with risk. Like in the present matter, the opportunity to plead to a lower charge with a lesser sentence compared with the outcome from a trial. As the People have noted, defendant through his counsel's plea bargain, faced a reduced maximum sentence of 15 years and an assurance from the trial judge on the amount of credit for time served. Without the plea bargain, defendant faced a life maximum sentence. Also see *Harrington v Richter,* 562 U.S. 86 (2011) where the Supreme Court again reversed the Ninth Circuit and reinstated a murder conviction, finding that trial counsel's decision not to present an expert witness on blood evidence was not ineffective assistance of counsel, but a strategic choice entitled to deference.

Defendant's trial counsel, according to even Defendant himself, discussed the speedy trial claim prior to defendant's unconditional plea. At the time of the plea, defendant indicated he

had no further questions of his counsel and was satisfied with her advice. His after the fact sentencing remorse brought through a claim of ineffective assistance of counsel is not supported by the facts of this case or the law. The highly deferential standard of review in a claim of ineffective assistance coupled with the lack of evidence that defendant would have done anything other than accept the plea, leads to the conclusion that Defendant's unconditional plea was freely, knowingly and voluntarily made. His claim regarding an alleged speedy trial violation was waived by this unconditional plea. His trial counsel was not ineffective in securing a plea where defendant's maximum sentence was reduced to 15 years; when he was otherwise facing a maximum of life, which was not an inconceivable penalty given the defendant's 15 prior felony convictions.

RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Thomas R Grden, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court affirm the Defendant's conviction.

Respectfully Submitted,

JESSICA R. COOPER
Prosecuting Attorney
Oakland County

THOMAS R. GRDEN
Chief, Appellate Division

By: /s/ Thomas R. Grden
Thomas R. Grden (P39288)
Assistant Prosecuting Attorney
Oakland County Prosecutor's Office
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 452-9178

DATED: June 7, 2016